U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433-2846

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 03 August 2007

CASE NO.: 2007-LHC-290

OWCP NO.: 07-173407

IN THE MATTER OF

A.D.[1],
Claimant,

v.

NORTHROP GRUMMAN SHIP SYSTEMS,
Employer

APPEARANCES:

BILLY W. HILLEREN, ESQ.
On behalf of Claimant

DONALD MOORE, ESQ.
On behalf of Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Claimant against Northrop Grumman Ship Systems, (Employer). The formal hearing was conducted

[1] Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

in Mobile, Alabama on May 24, 2007. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[2] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-15, and Employer's Exhibits 1-15 and 18.[3] Employer's Exhibit 16 and 17 were not admitted as evidence; however, EX-17, a surveillance video, was allowed for impeachment purposes. This decision is based on the entire record.

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of injury/accident is February 16, 2005.
2. The injury occurred in the course and scope of employment.
3. Employer/Employee relationship existed at the time of the accident.
4. Employer was timely advised of the injury.
5. A Notice of Controversion was timely filed.
6. Jurisdiction falls under the Act.
7. Claimant's average weekly wage at the time of his injury is disputed.
8. Compensation has been paid as follows:
   - Temporary total disability from February 28, 2005 through August 28, 2005. Total compensation of $12,427.25 has been paid.
   - Medical benefits of $17,643.90 have been paid.
9. Claimant reached maximum medical improvement on July 31, 2006.

Issues

The unresolved issues in this proceeding are:

1. Nature and Extent of Disability;
2. Whether Claimant has a loss of wage earning capacity, and the degree of the loss;

[2] The parties were granted time post hearing to file briefs. Both parties submitted timely briefs.

[3] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- (TR. pp __); Joint Exhibit (JX- __); Employer's Exhibit (EX- __); and Claimant's Exhibit (CX- __).

3. Whether self-employment earnings from Americas EZ Mortgage should be excluded from the average weekly wage calculation and from post-injury wage earning capacity calculations;
4. Average weekly wage;
5. Interest;
6. Other assessments;
7. Attorney's fees and costs; and
8. Employer's credit for compensation and wages paid.

Statement of the Evidence

Claimant

Claimant is 35 years old and resides in Mobile, Alabama. He has a high school degree and attended approximately two years of college. He spent a year at Hillsboro Community College and another year at Rex Electronics Institute. Most recently, Claimant has taken real estate and mortgage classes and in March 2007 received his real estate license.

Prior to his injury Claimant had primarily worked in shipyards. He worked for Employer, Bender Shipbuilding, and Frieda Goldman. Claimant began working for Employer in 2000 or 2001 as a first-class ship-fitter. Claimant described the ship-fitter position as strenuous, involving heavy lifting (usually over 50 pounds), pulling, climbing and positioning into tight spaces. Claimant also had to carry a tool bag that weighed between 65 and 70 pounds. He worked full-time, initially working five days a week. In 2004, Employer changed the work week to four days a week for 10 hours a day. In August of 2004, Claimant, in addition to working for Employer, began working with EZ Mortgage in Mobile, Alabama as a loan originator. Claimant is not an employee of EZ Mortgage; he is a self-employed, independent contractor. His duties as loan originator include procuring his own clients, checking their credit to find out what loan programs they qualify for, gathering information from the clients and closing the loan. When Claimant began this job he worked from his home and would go into the office only when he needed to. He explained that he could work at his own leisure and did not have set hours that he needed to be in the office nor any quota to meet.

Claimant stated that in 2004, while still working for Employer, he began having chest pains and was treated by Dr. Eyston Hunte. Claimant explained at this time he was working in a dusty area and could not always keep his respirator on due to his safety goggles fogging up. Claimant missed some work during the

period of time between August 2004 and February 2005 due to his chest pain. CX-10 contains off-work slips given to Claimant by Dr. Hunte[4].

Despite his success with the mortgage business, Claimant explained that his plan was to continue working for Employer because the job provided steady health insurance for him and his family and provided a 401(k)[5]. However, in February 2005, while working for Employer, Claimant slipped while stepping across a pipe and fell backwards onto another pipe striking his head, neck and back. Claimant was knocked unconscious. He was taken to Employer's hospital immediately following his injury and told to take some ibuprofen and go back to work. Claimant told the medic that he could not return to work and went home. The next day he returned to work and saw Employer's doctor, Dr. Warfield, who put Claimant on light duty. Claimant could not complete the work and told Employer that he was going to go see a different doctor. He went to see Dr. Fleet, a neurologist, who had treated Claimant many years prior.

Claimant treated with Dr. Fleet through mid 2006 and then had to switch doctors because Dr. Fleet's office closed. As a result of his work accident Claimant stated he suffered from dizziness, neck pain, lower back pain that went into his right leg, right arm numbness and headaches. Dr. Fleet performed an MRI on Claimant which revealed a bulging disc. He referred Claimant to physical therapy, prescribed a tens unit and back brace for Claimant as well as pain medication and sleeping aids. During his treatment with Dr. Fleet, Claimant began using a cane and discussed this with Dr. Fleet. Claimant told Dr. Fleet that in the mornings he sometimes gets dizzy and has headaches and if he does a lot of walking his leg gives way. Thus, Claimant used the cane to stabilize himself. Dr. Fleet told Claimant using the cane was fine.

After Dr. Fleet's office closed Claimant began, and is still currently, treating with Dr. Shaikh. Dr. Shaikh has tried different medications with Claimant to help find ones that will provide Claimant more relief[6]. Dr. Shaikh has prescribed

[4] CX-10 contains off-work excuses for 8/12/04, 8/13/04, 9/9/04 through 9/12/04, 10/7/04, 10/8/04, 10/20 through 10/22/04, 11/4/04 through 11/15/04, 12/2/04 through 12/7/04, 12/15/04, 12/16/04, 1/10/05 through 1/18/05 and 1/31/05 through 2/14/05.

[5] Claimant further explained that he would like to return to work for Employer. Besides the benefits provided by Employer, Claimant stated he received a lot of leads for his mortgage business by working for Employer**.** Claimant mentions his loss of health benefits and 401(k) plan as part of the loss he sustained when he was injured; however, he does not present specific evidence regarding these claims.

[6] Claimant explained that his symptoms are mostly the same as they were while he was treating with Dr. Fleet.

Rozerem as a sleeping aid for Claimant, however, worker's compensation has denied payment for this prescription and Claimant is paying for this medication out of pocket.

At the time that Claimant was treating with Dr. Fleet, Dr. Fleet had told Claimant that he [Claimant] could not return to his work as a ship-fitter. Thus, Dr. Fleet took Claimant off work status. Dr. Fleet did, however, approve the work he was doing with EZ Mortgage as appropriate for Claimant's condition. Dr. Shaikh also kept Claimant off work until January 2007 when he allowed Claimant to return to work under the condition that Claimant be able to rest and relax at his own pace to avoid pain and headaches. Claimant stated that Dr. Shaikh also limited him to lifting no more than 20 pounds. At this time Claimant attempted to return to work for Employer but was rejected because he brought his cane to work with him. Claimant explained he does not use the cane every day; however, when he attempted to return to work in January 2007, he took the cane to work with him because it is a long distance from the parking lot to the hospital, where he had to check-in, and the walk is strenuous for Claimant. Claimant presented his return to work slip to Employer's hospital and was told that due to the restrictions listed on the slip and because Claimant was using a cane he would not be allowed to return to work.

Following these events Claimant received a letter from Employer stating that his employment would be terminated, his compensation terminated and any future benefits terminated if he did not return to work by May 14, 2007. As a result, Claimant returned to work; however, his blood pressure was high and thus he received a non-industrial rejection. Claimant brought his cane to work with him on this occasion also and was told that he would need to get a doctor's note stating that he needed to use a cane at work. At this time Claimant still had the same restrictions, requiring him to be able to rest and relax to avoid pain and headaches, as were in place when he first attempted to return to work in January 2007.

After being told his blood pressure was high, Claimant, on May 16, 2007, went to Dr. Shaikh who tested him and found Claimant's blood pressure to be fine. Dr. Shaikh also gave Claimant a doctor's excuse for the use of his cane. Claimant relayed this information to Employer and again attempted to return to work but was rejected. The rejection slip stated, "Cannot work with restrictions. Cannot place due to use of cane." (CX-14, pp. 7)

On cross-examination, Claimant stated that he was not hospitalized following his injury nor did he have any surgeries. Claimant acknowledged that he

was treated by Dr. Fleet for two car accidents prior to his work-related injury (one occurring in the late 1990s and one occurring in 2001). During this prior treatment it was established that Claimant complained of headaches, backaches, dizziness and loss of balance, which are the same complaints Claimant currently has. A May 6, 2002 report from Dr. Fleet's office indicates that Claimant was under Dr. Fleet's care for routine visits to monitor his medication and condition[7]. Claimant pursued lawsuits against the insurance company in both of these prior accidents.

Claimant stated that on March 30, 2007, he went to Employer's counsel's office to have his deposition taken and he did not bring a cane. He also acknowledged that a surveillance video tape (which Claimant viewed prior to the hearing) showed him locking his car door and then briskly walking/trotting/jogging across a parking lot into an office building. Claimant was observed doing this at about 9:30 in the morning, which is around the time Claimant earlier stated he has his dizzy spells. Claimant also acknowledged that the video footage was shot from about 9:30 am until about 5:30 pm and that at no time during the filming did Claimant use his cane. As testified to, the first building Claimant is seen going in and out of is the Mobile Association of Realtors. Claimant is seen leaving the building, talking on his cell phone and stepping up over the curb and walking on the curb. Around noon Claimant is seen leaving the building, talking on his phone and getting into his car. Claimant is then shown at another location, EZ Serve Mortgage, walking across the parking lot, stepping up on a curb and walking into the building. Claimant is also seen going in an out of the building several times without a cane. Lastly, Claimant is seen going to his son's graduation that evening. On redirect, Claimant stated that at both EZ Serve Mortgage and Mobile Association of Realtors he parked relatively close to the door and did not have a long walk, maybe 30 or 40 steps to get to the buildings.

As of the time of the hearing, Claimant had already made approximately $40,000 in paid commission from EZ Serve Mortgage for the year 2007. Claimant had also made approximately $4,800 from closing real-estate deals sometime around April 2007. Claimant stated that over the past three years, since 2004, his income from EZ Serve Mortgage has grown tremendously. Although Claimant had just gotten started in the real-estate sales business, he had already made $5,000

[7] On redirect, Claimant stated that following these car accidents and treatment by Dr. Fleet he was still able to work and perform all of the duties of a first-class ship-fitter. He explained that following his treatment with Dr. Fleet and prior to his work injury in February 2005 he had become symptom free.

as of the time of the trial. Claimant testified that he hopes to continue growing these businesses.

Claimant's work with EZ Mortgage does not require any physically strenuous work and the office is located about five to eight minutes from Claimant's house. Claimant's earnings are based solely on commission. He pays for expenses such as marketing and advertising and has to pay processors to assist with his deals if he is unable to do them himself.

Regarding his increased earnings in 2007, he explained that this was due to Hurricane Katrina which caused a surge in work. When asked whether he anticipated this surge would continue he stated that the real-estate market always fluctuates and it is hard to anticipate what you're going to make.

As far as his realtor commission, Claimant explained that he incurs expenses related to this job which include marketing costs and licensing costs. He estimated that he has spent over one thousand dollars on expenses since getting his real estate license.

Michelle Edwards

Ms. Edwards works for Employer as the return to work coordinator for permanent restrictions. She replaced Melinda Wiley and was only involved in Claimant's latest, May 2007, attempt to return to work. Ms. Edwards stated that Claimant called her to remind her of his restrictions prior to coming in to see her. She explained that Claimant was able to be returned to work in May 2007 based on the restrictions which required him to be able to rest and relax[8]. Ms. Edwards explained that no other physical/medical restrictions were listed for Claimant[9]. However, when Claimant returned to Employer's on May 14, 2007, he used a cane, and policy requires that if an employee is going to use a cane, he must establish that it is medically necessary. But for his use of the cane on May 14, 2007, Claimant would have been returned to work.

Ms. Edwards also noted that Employer uses a bus to cut down on traffic and provide yard transportation. The bus starts to run at 4:30 am and circles the yard

[8] Ms. Edwards identified a note from Dr. Shaikh placing Claimant at maximum medical improvement as of March 2007 with no restrictions except that he rest and relax.

[9] Ms. Edwards did note that she will sometimes review medical information other than the return to work slip when it is needed to get a better understanding of what the employee requires.

constantly until about 6:00 pm. Other arrangements can also be made for individuals that need help walking long distances such as use of a golf cart or some type of vehicle.

Medical Records of Dr. William S. Fleet (CX-15)

Claimant began seeing Dr. Fleet on February 25, 2005. The notes from this day indicate that Claimant's right leg had previously given away while he was standing doing the dishes. (CX-15, pp. 4) On April 5, 2005 Claimant again complained of leg weakness and also of dizziness. A cane was also mentioned in the notes for this office visit, although no specific details were provided regarding the cane. (CX-15, pp. 4) On April 14, 2005 the office visit notes a cane was used because Claimant's right leg would give away. On May 3, 2005, Claimant complained of vertigo that is usually worse in the mornings. Following this appointment, Claimant continually complained of dizziness and right leg weakness. On October 10, 2005, Dr. Fleets' notes state, "No cane today but feels may need to resume due to right leg gives away at times." (CX-15, pp. 55) Throughout his treatment of Claimant Dr. Fleet had continuously kept Claimant off work. On July 31, 2006, Dr. Fleet placed Claimant at MMI; however, he specifically noted that he did not feel Claimant could return to work without any restrictions as Claimant was suffering from too much lower back pain[10]. (CX-15, pp. 76)

Medical Records from Dr. Ilyas A. Shaikh (CX-16)

On October 30, 2006, Dr. Shaikh, who had taken over the care of Claimant, took Claimant off work until further notice. On December 12, 2006, Dr. Shaikh summarized his plan of care for Claimant and noted that light duty with lifting no more than 20 pounds should be ok. (CX-16, pp. 11) Throughout his treatment with Dr. Shaikh Claimant complained of dizziness and right leg weakness. On January 24, 2007, Dr. Shaikh noted that Claimant becomes dizzy to the extent that he needs to use a cane. Dr. Shaikh also again noted that Claimant could return to light duty as of January 31, 2007, but should be able to rest and relax when needed. (CX-15, pp. 36) On May 11, 2007, Dr. Shaikh's notes again mention that Claimant feels dizzy and uses a cane to keep his balance. On May 16, 2007 Dr.

[10] It should be noted that Claimant was seen by Dr. Elias Chalhub, seemingly at the request of Employer, who indicated Claimant could return to work. Dr. Chalhub also indicated that there were no objective neurological findings for Claimant's condition. Based on Dr. Chalhub's opinion, Dr. Fleet was asked whether he agreed and thus placed Claimant at MMI on July 31, 2006.

Shaikh filled out a return to work form that stated, "[Claimant] may use walking cane to avoid pain or falls." (CX-16, pp. 36)

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Preface

This claim is a bit unusual and has issues that are not typically visited. For the reasons given, I find Claimant's pre-accident average weekly wage is properly reflected by applying section 10(a) to his shipyard wages only. In other words, I agree with Claimant that since his injury did not affect his ability to perform his work as mortgage originator these earnings should be excluded from the average weekly wage calculation. I do not agree with Claimant, however, that his post accident earnings as a mortgage originator and real estate agent should not be viewed as suitable alternative employment. To the contrary, given Claimant's full-time devotion to these jobs post accident, I find, beginning with 2006 and continuing, Claimant has suffered no loss of wage earning capacity and Employer's *Turner* burden is met. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Injury

Claimant testified that on February 16, 2005 he was injured while working for Employer when he fell backwards on some pipes. Both Employer's counsel and Claimant's counsel have stipulated that Claimant was injured on February 16,

2005 in the course and scope of employment and that the injury was reported to Employer. (JX-1)

Based on the facts and the party's stipulation, I find that Claimant has established a prima facie case of compensability in that he has established that he suffered a harm and that working conditions existed which could have caused the harm. No evidence was offered to rebut this presumption. Thus, based on the facts and stipulations of the parties I find that Claimant's injury was one arising out of or in the course of his employment.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). Claimant testified that following his accident he was unable to continue working for Employer. The next day Employer's doctor put Claimant on light duty, but Claimant was unable to complete the work and told Employer he was going to see his own doctor. Dr. Fleet saw Claimant on February 25, 2005 and took him off work status. Claimant was kept off work and on July 31, 2006 he was placed at MMI. (JX-1) When Claimant did attempt to return to work for Employer he was rejected because he brought his cane to work with him.

The parties agree Claimant reached MMI on July 31, 2006, but disagree as to whether or not, subsequently, Claimant could have returned to his shipyard employment. Given my findings concerning Claimant's suitable alternative employment, I find this issue to be moot. Prior to and following the February 16, 2005 accident, Claimant was self-employed as a loan originator and eventually as a realtor. I find that Claimant's self employment constitutes suitable alternative employment and therefore, his earnings from such are relevant in determining Claimant's post-injury wage earning capacity.

Following *Abbot v. Louisiana Ins, Guaranty Ass'n.,* 27 BRBS 192 (1993), aff'd 40 F.3d 122 (5th Cir. 1994), Claimant argues that a discretionary inquiry is required in order to determine whether Claimant's actual post-injury wages are an accurate reflection of his wage-earning capacity. Claimant specifically asserts that due to his physical limitations, his lack of experience and formal education, the time spent to achieve pre-injury production, and the instability of a commission based job that his post-injury earnings are not a fair reflection of his earning capacity. I disagree. Even prior to being injured, Claimant, in 2004, began working a second job as a loan originator. Over the course of approximately three

years he has steadily profited in this business. Most recently Claimant received his real estate license which will allow him to increase his earnings even further.

Although the vast majority of Claimant's work experience is heavy shipyard labor, he decided, prior to any injury, to pursue a second job and has proven that he is capable of performing and succeeding in this alternative employment. Claimant testified that he completed high school, two years of college and training courses necessary to work as a loan originator and realtor. Obviously, Claimant has the intellect and initiative necessary to perform work other than shipyard labor. Claimant did not present any evidence that he must spend more time working in order to achieve pre-injury production. Rather, Claimant acknowledged that because he is no longer working for Employer, he has more time to dedicate to his self-employment. Claimant testified that he can work at his own leisure and does not have to fulfill any quota for Americas EZ Mortgage. He stated that the work is not physically strenuous and he even worked from bed on occasion. The requirements of Claimant's self-employment seem to be a good match for any physical limitations he may have[11].

Although a commission based job such as Claimant's is subject to fluctuations, Claimant has not presented evidence establishing that his earnings are exceptionally tenuous or expected to decrease in the near future. Although Claimant, in his brief, argues that his earnings from self-employment are not expected to continue at the current rate due to a decrease in post Katrina loans, no evidence has been presented to establish this proposition. At the hearing Claimant acknowledged that the real-estate market always fluctuates; yet, he has proven himself capable of working and succeeding in such a market. Further, it should be noted that Claimant began working as a mortgage originator in August 2004, approximately one year prior to hurricane Katrina and, during this year, earned significant, steady commissions. Over the course of approximately three years Claimant's earnings from his self-employment have steadily increased and now that he has his real estate license his earning potential is even greater. Thus, I find Claimant's actual post-injury earnings reasonably and fairly represent his wage-earning capacity.

[11] Dr. Fleet approved of Claimant's work with EZ Mortgage as appropriate for Claimant's condition.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. ' 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev=d* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev=d en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked Asubstantially the whole of the year@ preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 weeks of work was Asubstantially the whole year@, where the work was characterized as Afull time@, Asteady@ and Aregular@). The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. ' 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If an employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation under The Act is determined by considering his previous earnings in employment in which he was working at the time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, ' 10(c), 33 U.S.C.A. ' 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997)

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). *Hayes v. P & M Crane Co.*, *supra*; *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. *See Story v. Namy Exch. Serv. Center,* 33 BRBS 111(1999).

As stated, Employer and Claimant dispute the appropriate method for determining average weekly wage. Claimant argues that 10(a) is applicable, and that only Claimant's earnings from his work for Employer should be included in my determination. Employer on the other hand argues that 10(c) is appropriate because Claimant is not a five or six day a week worker.

In this case, Claimant did work "substantially the whole of the year" prior to his injury, although, at some point during the 52 weeks prior to his injury Employer switched Claimant from a five day a week worker to a 4 day a week worker. Nevertheless, I find 10(a) is applicable to my determination of average weekly wage.

In sum, I accept Claimant's argument that in the 52 weeks preceding his accident, Claimant worked 212 days and earned $31,349.78[12]. Dividing his earnings by the days calculated to have been worked and multiplying by 260 for a five-day worker and dividing by 52, yields an average weekly wage of $739.38.

[12] Claimant worked 212 days comprised of 176 eight hour days and 23 ten hour days which convert to 29 eight hour days, plus seven paid holidays. (CX-9)

Suitable Alternative Employment

In August 2004, Claimant began working with Americas EZ Mortgage as a loan originator. From August 2004 until the date of injury, February 16, 2005, (28 weeks) Claimant earned $21,325.20 pre-injury. (CX-11, pp. 1) $21,325.20 divided by 28 weeks equals $763.76. Thus, I find $763.76 equals Claimant's average weekly earning capacity at the time of injury, solely from his self-employment. Next, this amount must be compared to his post-injury earnings from self-employment in order to determine his post-injury weekly wage-earning capacity.

In 2005, following Claimant's February 16 injury, he earned $38,938.34 from Americas EZ Mortgage, Inc. (CX-11) $38,938.34 divided by 45.43 weeks (from February 17, 2005 through December 31, 2005) equals a demonstrated weekly earning capacity of $857.11

In 2006, Claimant earned $85,544.29 from Americas EZ Mortgage and $1,600 from Forest Hill Mortgage Company Inc., for combined total earnings of $87,144.29. (CX-13) $87,144.29 divided by 52 equals a weekly earning capacity of $1,675.85 for the year 2006.

In 2007, as of the time of trial (From January to May 2, 2007), Claimant had earned $44,286.33 in commission from Americas EZ Mortgage (EX-9) and, as testified to at the hearing, has also earned at least an additional $4,800 from closing real-estate deals. This equals approximately $49,086.33 of earnings for the first four months of 2007. $49,086.33 divided by 18 weeks (approximately four months) equals a weekly earning capacity of $2,727.02.

It is obvious that post-accident, Claimant has been freed to pursue his career as a mortgage originator and real estate salesman full-time, turning what had been a part-time endeavor with average earnings of $763.76 per week into post-accident suitable alternative weekly earnings eventually equaling over $2,700 per week on average.

Consequently, excluding Claimant's demonstrated, average, pre-accident, self-employment, weekly earnings of $763.76, in the year 2006 he exceeded that figure by an average of $912.09 per week ($1,675.85 minus $763.76), and in 2007 has thus far exceeded that figure an average of $1,963.26 per week ($2,727.02 minus $4763.76). The only year he has failed to greatly exceed the $763.76 figure was in the remaining weeks of 2005, post-accident, when Claimant averaged earnings of $857.11, an increase of only $93.35 per week. ($857.11 minus

$763.76) Therefore, it is my finding that only from the date of injury, February 16, 2005, to December 31, 2005 is Claimant entitled to receive temporary partial disability compensation based on an average weekly wage of $739.38 and an earning capacity of $93.35. After December 31, 2005, because Claimant's average weekly earnings exceeded both his pre-injury weekly earnings with Employer as well as his pre-injury weekly self-employment earnings combined, and because compensation is based solely on an employee's pre-accident average weekly wage and his post-injury wage earning capacity, I find no other compensation owing.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A Claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). The Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atl. Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen*, 16 BRBS 10.

Section 7(c)(2) of the Act provides that when the employer or carrier learns of its employee's injury, it must authorize medical treatment by the employee's chosen physician. Once a Claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or District Director. *See* 33 U.S.C. § 907(c); 20 C.F.R. §

702.406. The employer is ordinarily not responsible for the payment of medical benefits if a Claimant fails to obtain the required authorization. *Slattery Assocs. V. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the Claimant has been effectively refused further medical treatment. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53; *Swain*, 14 BRBS at 664.

In this instance, Claimant testified that Dr. Shaikh prescribed a sleeping aid, Rozerem, for Claimant but the claim was denied by worker's compensation. Claimant paid for the prescription out of pocket and is requesting reimbursement. Dr. Shaikh is Claimant's treating physician and thus, Claimant is entitled to all reasonable and necessary medical expenses relating to his accident on February 16, 2005, as prescribed by Dr. Shaikh. Claimant testified that he has trouble sleeping due to pain from his injuries, and that Dr. Shaikh was recommending new medicines that would provide Claimant more relief. I find this to be a reasonably and necessary medical expense. Employer owes Claimant reimbursement for the cost of the Rozerem prescription. (CX-20, pp. 4)

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days after it has knowledge of the injury. 33 U.S.C. '914; *Jaros v. Nat'l Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988). In this instance, the parties stipulated that a timely notice of controversion was filed (JX-1).

ORDER

(1) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from February 16, 2005 to December 31, 2005 based on an average weekly wage of $739.38 and a demonstrated earning capacity of $93.35;

(2) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses resulting from Claimant's accident on February 16, 2005, including but not limited to, reimbursement for the prescription Rozerem, as recommended by Claimant's treating physician, Dr. Shaikh;

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(5) Claimant's counsel shall have twenty days (20) from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 3rd day of August, 2007, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge